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No. 07-1410

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner*,
v.
NAVAJO NATION,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF FOR FORMER SECRETARIES OF THE INTERIOR CECIL D. ANDRUS, BRUCE BABBITT, MANUEL LUJAN, JR., AND STEWART L. UDALL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTERESTS OF *AMICI CURIAE*[1]

*Amici* are four former Secretaries of the Department of the Interior. *Amicus* Stewart L. Udall served as Secretary of the Interior from 1961-69. *Amicus* Cecil D. Andrus, a former Governor of the State of Idaho, served as Secretary from 1977-81. *Amicus* Manuel Lujan Jr. served as Secretary from 1989-93. *Amicus* Bruce Babbitt, a former Governor of the State of Arizona, served as Secretary from 1993-2001. Thus, *Amici* have presided over the Interior Department for twenty-four of the last forty-seven years.

As former Secretaries of the Interior, *Amici* are interested in ensuring that the United States honors its trust obligations to the Navajo Nation and other Native Americans. Since its formation in 1849, the Interior Department has had primary responsibility for fulfilling these obligations. In addition, *Amici* are interested in the proper application of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 *et seq*., to the coal lease at issue in this case. The coal subject to that lease is one of the most valuable resources of the Navajo Nation, and therefore the lease was part of the infrastructure development plan that was, and still is, "the centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950." J.A. 569. This

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[1] Counsel for both the Navajo Nation and the United States have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *Amici* and their counsel has made any monetary contribution to the preparation and submission of this brief.

plan was formulated under the supervision of *amicus* Udall and has been pursued by subsequent Secretaries of the Interior. Accordingly, *Amici* are interested in ensuring that this lease is properly administered so that the Navajo receive a fair return and have resources that may be devoted to their continued economic development.

*Amici* agree with the Navajo Nation that the numerous laws and regulations concerning leasing on Indian lands create a network of such pervasive control by the Interior Department that, under this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Department has fiduciary obligations, which mandate compensation for injuries caused by their breach. *Amici* also agree that the Department has a fiduciary duty to the Indian people under the Indian lands provisions of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1300, and to the Navajo Nation under the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 *et seq*. *Amici* submit this brief to provide the Court with historical background on the Navajo-Hopi Rehabilitation Act and to describe the aspects of the Act and its implementing regulations that impose money-mandating fiduciary duties upon the Department.

## INTRODUCTION AND SUMMARY

Like many other Indian tribes, the Navajo Nation entered into treaties with the United States in which the Nation agreed to surrender much of its sovereignty and submit to the jurisdiction of the United States in exchange for the United States' promise to "so legislate and act as to secure the permanent prosperity and happiness" of the Navajo.

Treaty with the Navajo, art. 11, Sept. 9, 1894, 9 Stat. 974, 975; *see also id.* at art. 1, 9 Stat. at 974 (providing that the Navajo Nation shall submit to "the exclusive jurisdiction and protection of the Government of the said United States"). Accordingly, this Court has long recognized that such treaties make the "distinctive obligation of trust incumbent upon the Government" in its dealings with the Indian people. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (Nell J. Newton ed. 2005) (discussing the "special trust relationship between Indian tribes and the United States").

Despite the long recognition of these trust obligations, the United States neglected the economic development of the Navajo Nation, the largest tribe in the country, and by the late 1940s the Nation was in such dire circumstances that Congress was forced to authorize emergency relief on the Navajo Reservation.[2] To provide a basis on which the Navajo could establish self-sustaining communities and fulfill the country's obligation to foster the prosperity of the Navajo, Congress ordered the Interior Department to formulate a plan for the long-term development of the Navajo. This plan was subsequently submitted to Congress, which enacted the Navajo-Hopi Rehabilitation Act of 1950, 25

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[2] The relief also applied to the Hopi Reservation, which is surrounded by the Navajo Reservation. DEPARTMENT OF THE INTERIOR, REPORT ON THE NAVAJO: LONG-RANGE PROGRAM OF NAVAJO REHABILITATION vi (1948) (THE NAVAJO). For the sake of convenience, the brief generally refers only to the Navajo.

U.S.C. § 631 *et seq*., to facilitate the implementation of that plan.

In addition to funding important infrastructure improvements, the Navajo-Hopi Rehabilitation Act authorized the Navajo to enter into long-term leases for certain specified purposes relating to the development plan. To ensure that the Navajo obtained fair value for leases of their land and preserved the resources of the tribe for future development, in Section 5 of the Act Congress required the Secretary of the Interior to approve such leases and authorized the Secretary to issue regulations controlling the terms of such leases. Accordingly, the Interior Department has issued regulations controlling the rate, duration, and other terms of leases of Navajo lands.

Section 5 and the regulations implementing it impose fiduciary obligations upon the Interior Department that mandate compensation for their breach. These provisions confer upon the Interior Department broad control over the leasing of Navajo lands. Section 5 requires Department approval of leases of restricted Indian lands and gives the Department power to issue rules and regulations governing such leases, which the Department has exercised to regulate the rates charged in Navajo leases, their duration, and other terms. Moreover, in keeping with the purpose of Section 5, all applicable regulations require the Department to exercise these powers in the best interest of the Navajo so as to maximize the Tribe's economic benefit and protect it against inequalities in bargaining power.

The combination of broad control over another's property with the obligation to exercise that power

for the other entity's benefit is characteristic of a fiduciary relationship. Accordingly, as the Interior Department has long recognized, it acts as a fiduciary in approving leases for Navajo land. In addition, because a tribal beneficiary of a statutorily created trust is entitled to recover damages for breach of trust obligations, *Mitchell II*, 463 U.S. at 226, the Navajo are entitled to sue for the Department's indefensible breaches of its obligations to the tribe.

## ARGUMENT

### I. THE NAVAJO-HOPI REHABILITATION ACT REQUIRES THE INTERIOR DEPARTMENT TO ENSURE LEASES OF NAVAJO LAND ARE IN THE NAVAJO'S BEST INTEREST.

In the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631 *et seq*., Congress sought, among other things, "to make available the resources of the [Navajo reservation] for use in promoting a self-supporting economy and self-reliant communities." 25 U.S.C. § 631. Accordingly, the Act authorizes the Navajo Nation to lease its lands for "business purposes, including the development or utilization of natural resources in connection with operations under such leases." *Id*. § 635(a). Recognizing that the Nation would be at a disadvantage in bargaining with outside economic actors, Congress also required the Interior Department to review and approve any leases to ensure that such leases are in the Navajo's best interest.

### A. The Navajo-Hopi Rehabilitation Act Was Passed To Facilitate Economic Development Of The Navajo Reservation.

The Navajo-Hopi Rehabilitation Act was enacted in response to dire conditions on the Navajo Reservation as part of a plan for long-term development of the reservation.

By the late 1940s, it had become shamefully apparent that the Navajo Reservation was not sustaining the Navajo people and substantial federal intervention was necessary. As the Interior Department detailed in a 1948 report, "[b]y and large, the people live in abject poverty" on the Navajo Reservation. THE NAVAJO 7. Malnutrition was widespread, infant mortality high, and other diseases such as tuberculosis prevalent. *Id*. at 8-9. There was a serious shortage of public services, *id*. at 8, and the education system was so poor that more than 65% of the Navajo had no formal schooling and 80% were illiterate, *id*. at 11-12, 80. In addition, the Reservation lacked roads and other infrastructure needed to exploit the Reservation's resources. *Id*. at 16-21. As a result, the Reservation could support only about one-third of the more than 60,000 Navajo living on it. *Id*. at 7.

The Navajo-Hopi Rehabilitation Act was part of a long-term plan to develop the Navajo Reservation so that it could sustain the Navajo people. In 1947, in addition to appropriating $2,000,000 for emergency relief of the Navajo, Congress directed the Interior Department to formulate "a long-range program dealing with the problems of the Navajo and Hopi Indians." Act of Dec. 19, 1947, Pub. L. No. 80-390,

§ 2, 61 Stat. 940. In response to this directive, the Department recommended a multi-faceted plan of rehabilitation. *See* THE NAVAJO 25-101. One component of this plan was development of the Reservation's natural resources, including in particular the "extensive coal deposit underly[ing] the Black Mesa area," which had been identified but not significantly developed. *Id*. at 38.

Congress passed the Navajo-Hopi Rehabilitation Act in April 1950. *See* Pub. L. No. 81-474, 64 Stat. 44, 44-47 (codified as amended at 25 U.S.C. §§ 631-640). In keeping with the Interior Department's recommendations, the Act appropriated approximately $88 million for immediate infrastructure improvement projects, including surveys and studies of the Navajo's coal resources. *Id*. § 1 (codified at 25 U.S.C. § 631). The Act was not solely directed to appropriating funds, however. To "facilitate the fullest possible participation for the Navajo Tribe" in the development of its reservation, the Act gave the Navajo the right to adopt a tribal constitution, made funds held by the Treasury for the Navajo more available to the Tribe, and provided for the Tribe's involvement in rehabilitation plans undertaken by the Department. *Id*. §§ 6-8 (codified at 25 U.S.C. §§ 636-38). Finally, in Section 5 of the Act, Congress granted the Navajo the authority to enter into long-term leases of their land for certain specified purposes "with the approval of the Secretary of the Interior." *Id*. § 5 (codified at 25 U.S.C. § 635).

### B. Section 5 Of The Navajo-Hopi Rehabilitation Act Permits Long-Term Leasing Needed For The Navajo's Economic Development.

The authorization of long-term leasing by the Navajo in Section 5 of the Act was necessary because historically Indian tribes have been prohibited from leasing or otherwise alienating any of their lands. *See* 25 U.S.C. § 177 (originally enacted as Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730-31). Although an earlier statute had authorized, subject to Department approval, mineral leases on unallotted lands, *see* 25 U.S.C. § 396a *et seq*., Section 5 was intended "to make it possible for the Navajos . . . to grant long-term leases needed" for development projects. H.R. Rep. No. 81-1474, at 5 (1950). Accordingly, Section 5 authorized leasing of "[a]ny restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members . . . for public, religious, educational, recreational, or business purposes, *including the development or utilization of natural resources*." Pub. L. No. 81-474, § 5, 64 Stat. at 46 (emphasis added) (currently codified at 25 U.S.C. § 635(a)).

Section 5 originally limited such leases to an initial twenty-five year term and a single twenty-five year renewal term. *Id*. However, this term proved too short to permit lessees to obtain federally insured loans. *See* H.R. Rep. No. 86-1648, at 3 (1960). Therefore, in 1960, Congress amended the general long-term Indian leasing statute, which had been enacted in 1955 and contained language similar to Section 5, *see* Act of Aug. 9, 1955, ch. 615, § 1, 69 Stat. 539, to increase the maximum term of Navajo

leases to ninety-nine years. *See* Act of June 11, 1960, Pub. L. No. 86-505, § 2, 74 Stat. 199 (codified at 25 U.S.C. § 415(a)); *see also* H.R. Rep. No. 86-1648, at 3 (recommending that the increase "be in the form of an amendment to the general long-term leasing act, rather than an amendment to the Navajo-Hopi Rehabilitation Act").

### C. The Interior Department Is Required To Approve Leases Of Navajo Land Under Section 5.

Although the Navajo-Hopi Rehabilitation Act granted the Navajo the authority to lease restricted lands for business purposes, it also placed such leases under the supervision of the Interior Department. Specifically, Section 5 requires that leases of Navajo land be "with the approval of the Secretary of the Interior." Pub. L. No. 81-474, § 5, 64 Stat. at 46 (currently codified at 25 U.S.C. § 635(a)). In addition, Section 5 requires that leases "be made under such regulations as may be prescribed by the Secretary." *Id*. These requirements must be construed consistently with the design, purpose, and structure of the Act, which was plainly intended to benefit the Navajo and fulfill the treaty and trust obligations of the United States.

## II. SECTION 5 OF THE NAVAJO-HOPI REHABILITATION ACT CREATES FIDUCIARY DUTIES THAT MANDATE COMPENSATION FOR THEIR BREACH.

Section 5 of the Navajo-Hopi Rehabilitation Act imposes fiduciary duties upon the Interior Department, which mandate compensation for injuries caused by breach of those duties. The

United States has waived sovereign immunity against claims "founded . . . upon . . . any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1); *see also id.* § 1505 (authorizing Indian tribes to bring claims that "would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group"). Accordingly, where a federal statute or regulation imposes a duty to an Indian tribe that mandates payment of damages for its breach, the Government is subject to suit for damages by the tribe. *E.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-76 (2003); *Mitchell II*, 463 U.S. at 218. Section 5 of the Navajo-Hopi Rehabilitation Act imposes such a "money-mandating" duty.

### A. Section 5 Creates A Fiduciary Relationship That Imposes Fiduciary Duties Upon The Interior Department.

Section 5 of the Navajo-Hopi Rehabilitation Act creates a fiduciary relationship between the Interior Department and the Navajo. As the Interior Department's regulations make clear, that section gives the Department broad control over the leasing of Navajo lands, which is to be exercised for the benefit of the Navajo. Controlling the property of another for the other's benefit is distinctive of a fiduciary relationship. Accordingly, Section 5 is fairly interpreted as imposing the fiduciary duties inherent in such a relationship.

### 1. Section 5 And Related Regulations Confer Broad Control Over The Leasing Of Navajo Lands.

Section 5 and the regulations implementing it grant the Interior Department broad control over the leasing of Navajo lands.

Section 5 allows the Navajo Nation and individual Navajos to lease land only with the approval of the Interior Department. Consistent with the Government's unique general trust relationship with Indian nations, Indian tribes are generally prohibited from leasing or otherwise conveying Indian lands. *See* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.06 (Nell J. Newton ed. 2005). While Section 5 relaxes this prohibition, it also includes an important protection: it requires that leases be made "with the approval of the Secretary of the Interior." 28 U.S.C. § 635(a); *see also Anicker v. Gunsburg*, 246 U.S. 110, 119 (1918) (observing that 1908 statute concerning leases of allotted lands required Department approval "for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation"); *Tiger v. W. Investment Co.*, 221 U.S. 286, 310-11 (1911) (finding restraints on alienation of Indian lands intended to satisfy the Government's trust responsibilities);

*Sunderland v. United States*, 266 U.S. 226, 233 (1924) (same).

Section 5 also allows leases of Navajo land only for specified purposes and gives the Secretary authority to dictate the terms of such leases. First, in keeping with its objective of promoting the development of the Navajo Reservation, Section 5 does not permit leases for any purposes: it authorizes leases only "for public, religious, educational, recreational, or business purposes." 25 U.S.C. § 635(a). *But see id*. (providing that Section 5 should not be construed to repeal or affect any authority conferred by other statutes). Second, Section 5 requires leases to "be made under such regulations as may be prescribed by the Secretary." *Id*. Thus, Section 5 not only dictates the permissible purposes of leases; it also allows the Interior Department to dictate their terms.

Moreover, the Interior Department has exercised its rulemaking power to issue regulations governing the terms of leases of Navajo land. For example, in the regulations in force when Lease 8580 was amended, leases were required to "be in the form approved by the Secretary," 25 C.F.R.. § 162.5(a) (1984).[3] The regulations also required certain terms, *see id.* §§ 162.5(f)-(h), 162.9, and prohibited others, *see id.* § 162.5(e). Finally, they imposed certain standards. For example, Interior Department regulations require that the term of leases be "limited to the minimum duration . . . that will allow the highest economic return to the owner consistent

[3] Unless otherwise noted, citations to the federal regulations are to the 1984 edition of the regulations.

with prudent management and conservation practices." *Id*. § 162.8. In addition, the regulations generally prohibited Department approval of rental rates "less than the present fair annual rental value" unless the Secretary determines lower rates to be "in the best interest of the landowners." *Id*. § 162.5(b), (b)(3); *see also id*. § 162.5(b)(2) (providing safe harbor for leases by Indian tribes to religious organizations and government agencies "for religious, educational, recreational or other public purposes").

Thus, Section 5 and applicable Interior Department regulations gave the Department broad control over leases of Navajo land by demanding Department approval of all leases and dictating many terms of those leases.

**2. The Interior Department's Control Over Navajo Leasing Must Be Exercised For The Navajo's Benefit.**

Section 5 of the Navajo-Hopi Rehabilitation Act and Interior Department regulations require the Department to exercise its broad control over the leasing of Navajo lands for the benefit of the Navajo.

In light of the general trust relationship between the federal government and Indian tribes, this Court has previously recognized the "protective purpose of the Secretary's approval" in discussions of other statutes. *United States v. Navajo Nation*, 537 U.S. 488, 515-16 (2003) (Souter, J., dissenting) (discussing *Tiger v. W. Investment Co*., 221 U.S. 286 (1911)), *Anicker v. Gunsburg*, 246 U.S. 110 (1918), and *Sunderland v. United States*, 266 U.S. 226, 233 (1924)). As the Navajo-Hopi Rehabilitation Act was passed "to further the purposes of existing treaties

with the Navajo Indians" and to promote development of the Navajo Reservation, 25 U.S.C. § 631, the approval requirement in Section 5 evidently is motivated by the same protective purpose.

Moreover, Interior Department regulations specifically require the Department to act in the Navajo's best interest in certain circumstances. For example, the regulations require the Department to ensure that the term of any long-term leases are favorable to the Navajo. Specifically, the regulations require that leases be limited to a duration that "will allow the highest economic return" consistent with the purpose of the lease and "prudent management and conservation practices." 25 C.F.R. § 162.8.

Another regulation even more specifically requires the Department to act in the best interest of the Navajo. Although the regulations generally prohibit the approval of leases that are not for a "fair annual rental," 25 C.F.R. § 162.5(b), they make exceptions for rentals that are presumably in the Tribe's interest such as renting lands "for religious, educational, recreational, or other public purposes." *Id*. § 162.5(b)(2); *see also id*. (permitting below-market rentals "for purposes of subsidization for the benefit of the tribe"); *id*. (permitting below-market rentals for "homesite purposes to tribal members provided the land is not commercial or industrial in character"). Even more important, the regulations contain a catch-all exception for below-market rentals when those rentals are "*in the best interest*" of the landowner. *Id*. § 162.5(b)(3) (emphasis added). Thus, Interior Department regulations explicitly confirm that the Department's authority over leasing

of Navajo lands is to be exercised in the best interest of the Navajo.

### 3. The Interior Department's Authority To Control Navajo Property For The Benefit Of the Navajo Is Fiduciary In Nature.

Section 5 and related Interior Department regulations create a fiduciary relationship. As demonstrated above, these provisions give the Department broad control over the leasing of the land of another—namely, the Navajo—and they require the Department to exercise that authority to protect the Navajo. As the Federal Circuit concluded in analyzing the Department's general authority over the leasing of Indian lands, the "protection of another's financial interests by the exercise of independent judgment and control is, of course, the essence of a fiduciary's duty to the beneficial owner of a trust corpus." *Brown v. United States*, 86 F.3d 1554, 1562-63 (1996). Accordingly, the Department's duties under Section 5 should be understood to be fiduciary in nature.

This conclusion is supported by other considerations as well. First, Interior Department regulations use language that reflects a fiduciary relationship. In the second *Mitchell* decision, this Court found that the language of a statute "directly supports the existence of a fiduciary relationship" because it instructed the Department to consider the "'needs and best interests of the Indian owner and his heirs.'" *Mitchell II*, 463 U.S. at 224 (quoting 25 U.S.C. § 406(a)); *see also* RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 78 (2007) (noting that generally "a trustee has a duty to administer the trust solely in

the interest of the beneficiaries"). As noted above, Interior Department regulations implementing Section 5 similarly require that the Department consider the "best interest" of Indian landowners in approving below-market rental rates. 25 C.F.R. § 162.5(b)(3).

In *Mitchell II*, this Court also found that a regulation requiring the Government to act "so as to obtain the greatest revenue for the Indians" reflected a fiduciary relationship. *Mitchell II*, 463 U.S. at 224 (quotation omitted); *see also* RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 90 (noting a trustee's duty to maximize the beneficiary's returns). Interior Department regulations similarly require the Department to obtain the "highest economic return to the owners consistent with prudent management and conservation practices." 25 C.F.R. § 162.8. Here again, the language in Interior Department leasing regulations reflects the existence of fiduciary relationship.

Second, the duties imposed by Section 8 of the Act suggest a fiduciary relationship. As the Navajo Nation points out, Resp. Br. at 36, that section requires the Secretary to disclose its plans for developing the Navajo Reservation with the Nation and to consider and follow the Nation's recommendations whenever consistent with the purposes of the Act. 25 U.S.C. § 638. As fiduciaries have a duty to furnish information to their beneficiaries and take into account their wishes, *see, e.g.*, RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 82, this requirement of consultation and consideration also suggests a fiduciary relationship.

Third, the general trust relationship between the United States and the Navajo signifies a fiduciary relationship concerning the leasing of Navajo land. Although the general trust relationship is not sufficient by itself to establish a fiduciary duty, the finding of a fiduciary relationship is "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. The overall purpose of the Navajo-Hopi Rehabilitation Act similarly reflects a fiduciary relationship because, as shown above, Congress enacted the statute to satisfy its treaty and trust obligations, to facilitate the development of the Navajo Reservation, and to protect the Navajo from unfair and improvident leases. *See supra* pp. 5-9. Accordingly, Section 5 should be interpreted to require the Department to exercise its approval power to protect the Navajo, not to further the interests of private mining companies such as Peabody Coal.

The Court's prior decision in this case does not suggest otherwise. In that decision this Court considered the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. § 396a *et seq*., without considering the Navajo-Hopi Rehabilitation Act as well. Like the Act, IMLA requires Secretarial approval of mineral leases. *Id*. § 396a. However, it lacks the other indicia of a fiduciary relationship in the Navajo-Hopi Rehabilitation Act, which was enacted more than a decade after IMLA. For example, IMLA does not require that leases be made under regulations issued by the Department. Moreover, although the Interior Department's mineral leasing regulations set a minimum royalty rate, when Lease 8580 was amended, they did not require the Department to

determine whether the royalty rate is fair or otherwise consider the best interests of Indian tribes. 25 C.F.R. pt. 211. *But see Navajo Nation*, 537 U.S. at 495 n.1, 508 n.12 (noting 1996 amendment requiring consideration of the best interest of Indian tribes). Similarly, while the regulations set a maximum term for coal leases, they did not require that the leases allow for the maximum economic return. *See* 25 C.F.R. § 211.10. Indeed, the IMLA took a hands-off approach because it was intended "to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties." *Navajo Nation*, 537 U.S. at 508. As the Navajo-Hopi Rehabilitation Act was motivated by far more protective policies, and the Act specifically concerns both "coal . . . resources" on the Navajo Reservation, 25 U.S.C. § 631, and leases for "the development or utilization of natural resources," *id.* § 635(a), this Court's construction of IMLA does not undermine the conclusion that Section 5 of the Navajo-Hopi Rehabilitation Act imposes fiduciary duties with respect to the leasing of coal on the Navajo Reservation.

### B. As Section 5 Itself Recognizes, The Navajo Are Entitled To Recover Damages For Breach Of The Fiduciary Duties Imposed By The Navajo-Hopi Rehabilitation Act.

A statute or regulation establishing a substantive right against the Government creates a claim for damages if that provision "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *White Mountain Apache Tribe*, 537 U.S. at 472 (quoting

*Mitchell II*, 463 U.S. at 217). The fiduciary duties created by Section 5 easily satisfy this "fair interpretation" rule.

Because Section 5 imposes fiduciary obligations, it can fairly be interpreted to create a money-mandating right. As this Court has recognized, absent a damages remedy, "there would be little to deter federal officials from violating their trust duties . . . ." *Mitchell II*, 463 U.S. at 227 (quotation omitted). Accordingly, "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id*. at 226; *accord White Mountain Apache Tribe*, 537 U.S. at 475-76.

Section 5 recognizes that the Government may be held liable for violating its obligations in connection with the leasing of Navajo lands. Section 5 is divided into subsections concerning (a) the leasing of restricted Indian lands owned by the Navajo Nation and its members, (b) the disposition of land held in fee simple by the tribes, and (c) the transfer of unallotted lands to tribal government entities. *See* 25 U.S.C. § 635. The latter two subsections expressly disclaim any liability for the United States. *See id*. § 635(b) (stating that the lease, sale, or other disposition of "lands owned in fee simply by the Navajo Tribe . . . shall create no liability on the part of the United States"); *id.* § 635(c) (providing that "the United States shall have no responsibility or liability for . . . advice and assistance in, the management, use, or disposition" of lands transferred to municipal corporations or corporations organized by the Navajo). But the first subsection, the one at issue here dealing with leasing of

restricted Indian lands, contains no disclaimer of government liability.

The omission of any disclaimer of liability in subsection (a) confirms that the United States may be held liable for breaching its duties under that section relating to the leasing of restricted Indian lands. As this Court repeatedly has observed, when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). This principle applies with special strength here because subsections (b) and (c) were added to Section 5 by amendment. *See* Act of June 11, 1960, Pub. L. No. 86-505, § 1, 74 Stat. 199 (1960). If current subsection (a) did not impose liability upon the United States, Congress would either have included a similar disclaimer in subsection (a) or not included any disclaimers in Section 5.[4]

### C. The Fiduciary Duties Imposed By Section 5 Are Precise And Well Understood By The Interior Department.

The Government contends that recognizing a fiduciary duty in this case would subject the Interior

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[4] As the Navajo Nation demonstrates, the fact Section 5 recognizes that the United States may be held liable in connection with the leasing of restricted Indian lands also confirms that Section 5 creates substantive rights on behalf of Indian tribes. Resp. Br. at 35-36.

Department to "a broad and amorphous set of trust principles" and thereby "introduce[] grave uncertainty" into the Interior Department's activities. Gov. Br. 42. That is incorrect. The duties imposed by Section 5 are precise and well understood, and, in the main, the Department has honored them.

Section 5 imposes limited duties upon the Interior Department. The terms of that provision and related Department regulations "define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224. Thus, the contours of the United States' fiduciary responsibilities are restricted by the clear and specific objectives of the Navajo-Hopi Rehabilitation Act and the regulations implementing it.

For example, in determining whether to approve a lease by the Navajo, the implementing regulations require the Department to determine whether the lease has a "fair annual rental," 25 C.F.R. § 162.5(b), and prohibit approval of a below-market rate unless the lease either falls into one of several defined categories, *id*. § 162.5(b)(2), or is "in the best interest" of the tribe, *id*. § 162.5(b)(3). For the Department, these are clear and workable standards. As the record in this case shows, the Department has access to economists, engineers, geologists, and other experts needed to ascertain fair market value. *See* J.A. 14-23, 73-88 (geologist reports); J.A. 24-47, 48-72 (report from engineer and economist), J.A. 16-18 (listing expert reports submitted to it). Determining whether a lease is, for example, to a religious organization or for recreational purposes (*see* 25 C.F.R. § 162.5(b)(2)) is straightforward, and the

implementing regulations give the Department reasonable discretion to determine when a below-market rental is in the best interest of a tribe. *See id*. § 162.5(b)(3) ("Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners.").

The Department is capable of making the other determinations required by Section 5 and its implementing regulations. For example, while the regulations require the Department to determine whether the duration of a lease will "allow the highest economic return" consistent with prudent management, 25 C.F.R. § 162.8, the Department can use economists and other experts to make that determination. Moreover, the requirements that leases include certain lease terms, exclude others, and use a form prescribed by the Department (*see supra* p. 12) are easily applied.

It is true that fiduciary duties bring with them ancillary obligations such as the duties of care, loyalty, and candor. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS §§ 77, 78, 82. While serious, these additional obligations are not "amorphous" or fraught with "grave uncertainty." Gov. Br. 42. Rather, the Department has long recognized that it has trust obligations to the Navajo and other Indian peoples, and it is well aware of how to comply with the fiduciary duties imposed by those obligations. Indeed, Department lawyers warned Secretary Hodel that any *ex parte* contacts with Peabody Coal might be challenged, J.A. 122-23, 148-49, and Department officials understood that they were violating their duty of candor to the Navajo Nation by misleading

the Navajo about Secretary Hodel's instructions, J.A. 169.

Far from imposing vague new responsibilities, Section 5 and its implementing regulations simply require the Department to comply with its own regulations and observe the basic minimum standards of fiduciary conduct with which it is well acquainted.

### D. The Interior Department Applied The Navajo-Hopi Rehabilitation Act And Related Regulations To Lease 8580.

The Government also asserts that the Navajo-Hopi Rehabilitation Act is inapplicable because the Act largely expired in 1960 and because Lease 8580 was issued pursuant to the IMLA rather than the Act. Gov. Br. at 43-48. Neither argument is persuasive.

*First*, contrary to the Government's suggestion, the Navajo-Hopi Rehabilitation Act did not expire in 1960. It is true that the Act mandated a program of infrastructure improvements, which should "be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years" from April 19, 1950. 25 U.S.C. § 632; *see also id.* § 631(1)-(14) (detailing improvement program). There is, however, nothing in the Act limiting its application beyond that point. The Act was not limited to immediate infrastructure improvement, *see supra* p. 7, and Section 5 was not part of that improvement program. Thus, both the Act in general and Section 5 in particular plainly continued in effect past 1960.

Both Congress and the courts have recognized that the Navajo-Hopi Rehabilitation Act continues in effect. Congress repeatedly has amended the Act more than ten years after its original passage in April 1950. *See* Act of June 11, 1960, Pub. L. No. 86-505, 74 Stat. 199 (amending Section 5); Act of Dec. 22, 1974, Pub. L. No. 93-531, § 26, 88 Stat. 1723 (deleting Section 9); Act of Aug. 21, 1996, Pub. L. No. 104-193, Title I, § 110(u), 110 Stat. 2175 (deleting Section 10). Similarly, this Court and others continue to issue decisions concerning the Act. *See, e.g.*, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (noting legitimacy of Navajo Tribal Council and citing Sections 5, 7, and 8 of the Act); *Austin v. Andrus*, 638 F.2d 113, 114 (9th Cir. 1981) (citing Section 5); *Hernandez-Cordero v. INS*, 819 F.2d 568, 572 (5th Cir. 1987) (Rubin, J., dissenting) (citing Section 6); *EEOC v. Peabody W. Coal Co.*, 2006 U.S. Dist. LEXIS 74478, at *29 (D. Ariz. Sept. 30, 2006) (noting that Section 3 expressly approves tribal employment preferences).

The Government's argument that Section 8 is inapplicable because it relates to infrastructure improvements authorized in Section 1 of the Act (Resp. Br. at 39) fares no better. As demonstrated above, Section 8 reflects the fiduciary nature of the relationship created by the Act. *See supra* p. 16. Whether or not Section 8 continues to have any operative effect, this point holds true.

*Second*, Lease 8580 was approved pursuant to Section 5 and related regulations. Section 5 authorizes the lease of restricted Indian lands, among other things, for "business purposes, *including the development or utilization of natural*

*resources* in connection with operations under such leases." 25 U.S.C. § 635(a) (emphasis added). As Lease 8580 is a lease of restricted Navajo land for coal mining, it is a lease for a "business purpose" involving the "development or utilization of natural resources" and therefore falls within the plain language of Section 5.

In keeping with the plain language of Section 5, the Government has recognized that Lease 8580 was reviewed pursuant to the Navajo-Hopi Rehabilitation Act. Br. for Fed. Appellees, at 4-5, *Austin v. Andrus*, No. 78-1896 (9th Cir. Aug. 1978). In 1978, in a case concerning Lease 8580, the Government represented that "*[p]ursuant to 25 U.S.C. 635*, the Secretary reviewed the leases negotiated by the Navajo and Hopi Tribes with Peabody Coal to assure that the leases comported with the statutory protections for tribal members and property." *Id.* at 31 (emphasis added). Citing Section 5, the Government likewise represented that the Navajo were permitted "to lease tribal property for mineral development, subject only to approval of the lease form by the Secretary of the Interior." *Id*. at 5; *see also id*. at 25-26 (citing 25 U.S.C. § 635 and stating that "[t]he Secretary of the Interior was required by law to approve the lease entered into by the Tribe, based upon the trust responsibilities of the United States for Indians").

Disregarding these statements, the Government points out that the Interior Department's current general leasing regulations exclude mineral leases. *See* Gov. Br. at 47 (citing 25 C.F.R. § 162.103(a)(1) (2008)). The current regulations, however, were promulgated in 2001 when the Department overhauled its leasing regulations. *See* 66 Fed. Reg.

7068, 7112 (2001). The regulations in effect when the events at issue in this case occurred contained no such restriction. *See* 25 C.F.R. pt. 162 (1987). Although a regulation issued in 1954 had excluded mineral leasing from the general leasing regulations, 19 Fed. Reg. 2393 (Apr. 23, 1954) (codified at 25 C.F.R. § 171.30), it was deleted two years later when the general leasing regulations were revised. *See* 21 Fed. Reg. 2562 (Apr. 19, 1956). Accordingly, between 1956 and 2001, the general leasing regulations applied to mineral leases on the Navajo Reservation.

Peabody Coal recognized that the Interior Department's general leasing regulations apply to mineral leases and to Lease 8580 in particular in a brief filed in an Arizona appellate court in 1987. J.A. 467-70. In that brief, Peabody recognized that it was subject not only to regulations concerning mineral leasing, *see* J.A. 468-69 (discussing regulations under 25 C.F.R. pt. 211), but also to general leasing regulations "promulgated pursuant to 25 U.S.C.A. § 635." J.A. 468. These regulations, Peabody Coal observed, require leases to be "in a form approved by the Secretary of the Interior," J.A. 468 (citing 25 C.F.R. § 162.5), the rate to be a "fair annual rental," *id.* (citing 25 C.F.R. § 162.5(b)), "[s]atisfactory surety bonds," *id.* (citing 25 C.F.R. § 162.5(c)), and adequate insurance, *id.* at 468-69 (citing 25 C.F.R. § 162.5(b)).

It makes no difference that Lease 8580 specifically references the mineral leasing regulations. *See* Gov. Br. at 47 (citing J.A. 197). As Peabody Coal recognized, Lease 8580 was subject to the general leasing regulations promulgated in part under Section 5 *and* the mineral leasing regulations.

Far from suggesting otherwise, Lease 8580 requires Peabody Coal to "abide by and conform to *any and all* regulations of the Secretary of the Interior now or hereafter in force relative to such leases." J.A. 197 (emphasis added). In addition, the lease contains terms required by the general leasing regulations. The Interior Department's general leasing regulations contain two requirements not found in the mineral leasing regulations: a provision disclaiming any termination of federal trust responsibility, 25 C.F.R. § 162.5(g)(2), and a provision agreeing not to use the leased premises for any unlawful conduct or purpose, *id.* § 162.5(g)(3). Lease 8580 contains both provisions. *See* J.A. 202 (Article XIII concerning termination of federal trust responsibility); J.A. 202-203 (Article XXIV concerning use of premises for unlawful conduct).

Ignoring these provisions, the Government points to the term of Lease 8580, which it asserts is in violation of Section 5. Gov. Br. at 47-48. In particular, the Government points out that Lease 8580 extends for so long as coal may be mined on the property in question. J.A. 189. This provision tracks the language of IMLA, *see* 25 U.S.C. § 396a, not Section 5, which authorizes leases only for a term of twenty-five years with an additional renewal period not to exceed twenty-five years. 25 U.S.C. § 635(a). Section 5, however, does not "repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law." *Id.* As a consequence, when Section 5 overlaps with another statute, the other statute's provisions remain in effect. Thus, the term provision in Lease 8580, though apparently derived from IMLA, is consistent with the applicability of Section 5

evidenced by other provisions in the lease as well as the representations of Peabody Coal and the Government in prior proceedings.

## III. THE INTERIOR DEPARTMENT BREACHED ITS FIDUCIARY DUTIES BY SECRETLY FAVORING PEABODY COAL AND THEN APPROVING THE RESULTING AMENDMENT TO LEASE 8580.

The Interior Department's conduct in this case fell far short of the standards that Department officials normally observe. Under the supervision of *Amici* and most other Secretaries of the Interior, the Department has taken seriously its trust obligations to the Indian tribes under its protection and treated them as beneficiaries of its fiduciary obligations. In the conduct at issue in this case, the Department sharply departed from these practices and breached its fiduciary obligations to the Navajo.

As the Court of Federal Claims observed, the Department has "no plausible defense" for the actions at issue in this case. Pet. App. 136a. A fiduciary is required to act with care, skill, and caution, in light of the interest of his or her beneficiary. *See* RESTATEMENT (THIRD) OF TRUSTS § 77. Closely coupled with the duty of care is the duty of loyalty, the duty to act solely in the interests of a beneficiary without regard to the interest of third parties. *See id*. § 78.

The Department plainly breached these duties. By July 1985, the Bureau of Indian Affairs had prepared and readied for signature an opinion affirming the Navajo Area Director's order to

increase Lease 8580's royalty rate to 20%. Pet. App. 127a; J.A. 89-97. However, after an *ex parte* meeting with a lobbyist for Peabody Coal, Secretary Hodel assumed personal jurisdiction over the appeal and instructed Department officials—in a memorandum drafted by Peabody Coal—to suspend action on the appeal and wait for the parties to reach a settlement. Pet. App. 127a-128a; J.A. 117-18, 162, 164.

As a result of these actions, Peabody Coal was able to reduce its royalty payments by nearly 50%. Because the Navajo were "[f]acing severe economic pressures," Pet. App. 90a, this suspension gave Peabody Coal significant bargaining power over the Navajo, who eventually agreed to a royalty rate of 12.5%, little more than half the rate ordered by the Area Director. Moreover, the Navajo surrendered millions in unpaid royalties and back taxes, and also surrendered the Secretary's power to adjust royalties in the future. J.A. 128, 462. Thus, the Navajo were deprived of hundreds of millions of dollars over the course of the lease. J.A. 187.

The Department violated another basic fiduciary duty as well. A fiduciary has a duty of candor, which requires it not only to be truthful but also to communicate material facts that its beneficiary needs to know for its protection in dealing with third parties. *See* RESTATEMENT (THIRD) OF TRUSTS § 82. The Department breached this duty. Peabody Coal was informed of Secretary Hodel's instructions to withhold any decision on the Peabody Coal appeal when the instructions were given. J.A. 164. The Navajo, however, were never informed of the instructions. Pet. App. 128a; J.A. 593-95, 599-602. Instead, the Department sent the Navajo a letter

falsely stating that a decision in the appeal was "currently being considered." J.A. 125; *see also* J.A. 169 (noting that Department officials were aware of the falsity of the letter).

This conduct is indefensible. The Interior Department's actions undermined one of the key components of the Navajo-Hopi Rehabilitation Act and deprived the Navajo of hundreds of millions of dollars that should have been used to finance further development and economic growth on the Navajo and Hopi Reservations. As the Court of Federal Claims observed, "[t]here is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." Pet. App. 136a. These breaches should not go unremedied.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

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